



Similarly, the "advisability" of one agency's issuing such an order is also dependent upon the powers and responsibilities which under law are possessed by the agency. In some cases, such an order could be required by law or by the agency's rules; in others, such an order could be left to the discretion of the agency; in still other cases, such an order could go beyond the agency's authority, and therefore be improper. The "advisability" of an order would thus depend upon the law and regulations which govern the actions of the agency, including that which governs the exercise of discretion by agency officials.

In this case, the NRC's authority derives from the Atomic Energy Act, 42 U.S.C. §2011 et seq.<sup>1/</sup> The Act authorizes the NRC, among other things, to issue licenses for the operation of nuclear power plants and to promulgate rules and regulations as necessary to carry out the purposes of the Act. Section 161 of the Act also authorizes the Commission "by subpoena to require any person to appear and testify, or to appear and produce documents, or both. . . ." 42 USC § 2201(c). The term "person" is defined in Section 115 as "any individual, corporation, partnership, firm . . . Government agency other than the Commission . . . and . . . any legal successor, representative, agent or agency of the foregoing." 42 USC § 2014. The Act also requires the Commission to hold a hearing upon the request of any person whose interest may be affected by the proceed-

---

<sup>1/</sup> Although the NRC was established by the Energy Reorganization Act of 1974, 42 USC § 5801 et seq., the functions, powers, and responsibilities of the NRC are set forth in the Atomic Energy Act of 1954, as amended, 42 USC § 2011 et seq. See 10 CFR § 1.1.

ing. This Section 189 hearing requirement has been held to apply to any material factors relied upon by the Commission in making its licensing decisions. Union of Concerned Scientists v. NRC, No. 82-2053, \_\_\_ F.2d \_\_\_ (May 25, 1984). Section 191 of the Act further authorizes the Commission to establish Atomic Safety and Licensing Boards "to conduct such hearings as the Commission may direct and make such intermediate and final decisions as the Commission authorizes with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder."

Pursuant to the Atomic Energy Act, the NRC has adopted rules of practice which include the delegation of authority to Atomic Safety and Licensing Boards. Such authority includes the power to issue subpoenas, rule on offers of proof, receive evidence, order depositions to be taken, rule on motions, issue protective orders, regulate the course of hearings, and issue initial decisions. 10 CFR §§ 2.718, 2.721, 2.730, 2.740, 2.760. The rules adopted by the Commission also include provisions for discovery by interrogatories, document requests, depositions and subpoenas to parties and persons who are not parties. The NRC's rules state that "It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears to reasonably calculated to lead to the discovery of admissible evidence." 10 CFR §2.240(1).

The authority of Licensing boards to issue orders compelling depositions or production of documents, whether pursuant to notices and requests or applications for subpoenas, is not limited by the person who is the subject of such an order.<sup>2/</sup> Licensing boards are not prohibited by the Atomic Energy Act or the NRC's rules from ordering an agency of the government to produce documents, pursuant to the discovery rules, in a particular proceeding. Indeed, by the Commission's own definitions, which are consistent with those in the Act, the power to order production of documents (by subpoena) is expressly extended to government agencies. See 10 CFR § 2.4(o). Thus, according to the law under which the NRC is empowered to act, it is clearly permissible for the NRC to order FEMA to produce documents.

In the County's view, the "advisability" of such an order here -- like the May 18 ASLB Order which is the subject of this appeal -- is also governed by the Commission's own regulations and the fact that FEMA has voluntarily subjected itself to the NRC's jurisdiction in this proceeding. The particular regulatory provisions (Section 189 of the Atomic Energy Act and 10 CFR §§2.740, 2.743(a), and 50.47(a)(2)) and their applicability in the context of this case and the facts involved in the balancing test required to determine

---

<sup>2/</sup> Although there are particular procedures governing discovery requests directed to the NRC Staff, those are not relevant here. Moreover, the standards for requiring the production of documents and witnesses, if objected to by the NRC Staff, are not substantively different from those applicable to motions for protective orders and motions to compel discovery from persons other than the NRC Staff.

whether the asserted FEMA privilege has been overcome, are discussed at length in prior pleadings of the County and will not be repeated here. The fact that FEMA has submitted testimony to the ASLB, intends to offer written testimony and the RAC Report into evidence, intends to present witnesses to testify at the hearing, has been accorded the opportunity of cross examining other witnesses, has participated regularly in conferences of counsel held by the ASLB, and has regularly availed itself of all the protections provided by the NRC's rules, makes it fully subject to the NRC's jurisdiction. Accordingly, FEMA is obligated to comply with the requirements of the NRC's rules, including Licensing Board Orders to produce documents.

There is nothing in the Atomic Energy Act or the NRC rules which authorizes the NRC to grant preferential treatment or status to FEMA, or to any other government agency that has subjected itself to the NRC's jurisdiction by participating in an adjudicatory proceeding. Not only would the granting of such a preferred "above-the-law" status to FEMA be unauthorized and unadvisable, it would also constitute a blatant violation of the County's rights under the NRC's rules of discovery and cross examination, and the right guaranteed in Section 50.47, to rebut the FEMA findings, all of which were recognized by the ASLB in its May 18 Order.<sup>3/</sup>

---

<sup>3/</sup> The permissibility and advisability of the ASLB's order compelling FEMA to produce documents is unaffected whether FEMA is considered a party to this proceeding, a "consultant" to the NRC, or something else. The ASLB's authority goes to any person, which by definition includes government agencies. Similarly, any person which subjects itself to the jurisdiction of the NRC is obligated to comply with NRC's regulations.

The Memorandum of Understanding between the NRC and FEMA is not relevant to either the "permissibility" or "advisability" of affirming the ASLB order at issue here. That Memorandum is not law; it does not and cannot extend, diminish, or have any effect whatsoever upon the authority of the NRC. As discussed above, such authority is stated in the Atomic Energy Act and the NRC's own regulations. The Memorandum is simply an agreement between two agencies. It does not have the status or authority of law or regulation. It cannot be used to limit the powers or responsibilities assigned by Congress to the NRC.

However, the Memorandum does evidence a clear intent, by both FEMA and the NRC, that FEMA would be subject to the jurisdiction of NRC licensing boards in licensing proceedings. The following language in the Memorandum is illustrative:

FEMA will provide support for NRC reactor, full facility and material licensing reviews, as requested, with regard to the assessment of the adequacy of State and local response plans for accidental radiological releases.

. . . .

FEMA routine support will include providing assessments of State and local plans related to reactor Construction Permit and Operating License reviews . . . . To support its findings and determinations, FEMA will make expert witnesses available before the Commission, the NRC Advisory Committee or Reactor Safeguards, NRC hearing boards and administrative law judges, any court actions, and during any related discovery proceedings.

Memorandum at III.A (emphasis added).

It should be noted that the Memorandum does not say that FEMA will "support its findings and determinations" before NRC hearing boards and in related discovery but will keep secret the underlying documents and information concerning the process by which it arrived at such findings and determinations. Similarly, the Memorandum does not say that "FEMA will make expert witnesses available" before NRC boards and in related discovery, but such witnesses shall not have to testify as to the bases for their opinions or how they were derived.

Thus, although the Memorandum has no legal impact on either the permissibility or the advisability of affirming the May 18 ASLB order, nonetheless it clearly demonstrates that both the NRC and FEMA contemplated the participation of FEMA in NRC adjudicatory proceedings. There is nothing in the Memorandum or in the law under which the NRC is required to act, which makes it either permissible or advisable to exempt FEMA from the jurisdiction of the NRC in this licensing proceeding.

Respectfully submitted,

Martin Bradley Ashare  
Suffolk County Attorney  
H. Lee Dennison Building  
Veterans Memorial Highway  
Hauppauge, New York 11788



Herbert H. Brown  
Lawrence Coe Lanpher  
Karla J. Letsche  
KIRKPATRICK, LOCKHART, HILL,  
CHRISTOPHER & PHILLIPS  
1900 M Street, NW  
Washington, DC 20036

Date: June 5, 1984

Attorneys for Suffolk County

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

\_\_\_\_\_  
In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

) Docket No. 50-322 (O.L.)  
) (Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of Supplemental Brief of Suffolk County in Response to May 30 Appeal Board Order have been served on the following this 5th day of June 1984, by U.S. mail, first class, except as otherwise noted.

James A. Laurenson, Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Ralph Shapiro, Esq.  
Cammer and Shapiro  
9 East 40th Street  
New York, New York 10016

Dr. Jerry R. Kline  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

\*\* W. Taylor Reveley III, Esq.  
Hunton & Willaims  
P.O. Box 1535  
707 East Main Street  
Richmond, Virginia 23212

Mr. Frederick J. Shon  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Jay Dunkleberger  
New York State Energy Office  
Agency Building 2  
Empire State Plaza  
Albany, New York 12223

Edward M. Barrett, Esq.  
General Counsel  
Long Island Lighting Company  
250 Old Country Road  
Mineola, New York 11501



Mr. Brian McCaffrey  
Long Island Lighting Company  
Shoreham Nuclear Power Station  
P.O. Box 618  
North Country Road  
Wading River, New York 11792

Nora Bredes  
Executive Director  
Shoreham Opponents Coalition  
195 East Main Street  
Smithtown, New York 11787

Marc W. Goldsmith  
Energy Research Group, Inc.  
400-1 Totten Pond Road  
Waltham, Massachusetts 02154

MHB Technical Associates  
1723 Hamilton Avenue  
Suite K  
San Jose, California 95125

Joel Blau, Esq.  
New York Public Service Commission  
The Governor Nelson A. Rockefeller  
Building  
Empire State Plaza  
Albany, New York 12223

Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

\* Edwin J. Reis, Esq.  
Bernard M. Bordenick, Esq.  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Stuart Diamond  
Business/Financial  
NEW YORK TIMES  
229 W. 43rd Street  
New York, New York 10036

Stephen B. Latham, Esq.  
Twomey, Latham & Shea  
P.O. Box 398  
33 West Second Street  
Riverhead, New York 11901

Docketing and Service Section  
Office of the Secretary  
1717 H Street, N.W.  
U.S. Nuclear Regulatory Comm.  
Washington, D.C. 20555

Hon. Peter F. Cohalan  
Suffolk County Executive  
H. Lee Dennison Building  
Veterans Memorial Highway  
Hauppauge, New York 11788

Eleanor L. Frucci, Esq.  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Comm.  
Washington, D.C. 20555

Martin Bradley Ashare, Esq.  
Suffolk County Attorney  
H. Lee Dennison Building  
Veterans Memorial Highway  
Hauppauge, New York 11788

Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Comm.  
Washington, D.C. 20555

Jonathan D. Feinberg, Esq.  
Staff Counsel, New York State  
Public Service Commission  
3 Rockefeller Plaza  
Albany, New York 12223

\*\*Stewart M. Glass, Esq.  
Regional Counsel  
Federal Emergency Management  
Agency  
26 Federal Plaza  
New York, New York 10278

\* Spence Perry, Esq.  
Associate General Counsel  
Federal Emergency Management Agency  
Washington, D.C. 20471

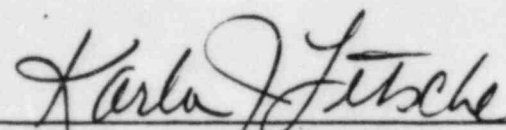
Fabian Palomino, Esq.  
Special Counsel to the Governor  
Executive Chamber  
Room 229  
State Capitol  
Albany, New York 12224

\* Alan S. Rosenthal, Chairman  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

James B. Dougherty, Esq.  
3045 Porter Street, N.W.  
Washington, D.C. 20008

\* Mr. Howard A. Wilber  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555

\* Mr. Gary J. Edles  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555



Karla J. Letsche  
KIRKPATRICK, LOCKHART, HILL,  
CHRISTOPHER & PHILLIPS  
1900 M Street, N.W., Suite 800  
Washington, D.C. 20036

Date: June 5, 1984

---

\* By Hand  
\*\* By Telecopier